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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EL DORADO TERMINAL COMPANY (a corporation), *Appellant* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), GENERAL AMERICAN TRANSPORTATION (a corporation), *Appellees.*	No. 11,538
EL DORADO TERMINAL COMPANY (a corporation), *Appellant,* vs. GENERAL AMERICAN TANK CAR CORPORATION (a corporation), *Appellee.*	No. 11,539

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant has appealed from the judgments of dismissal in two cases entered on orders for summary judgments after a pretrial conference. Both actions were based on the same contract. In one of the actions, appellant sought to recover on the contract liability sums collected by appellee for appellant's account between July 1, 1934 and May 31, 1935, and in the other recovery is sought for sums likewise collected

and retained by appellee from May 31, 1934 to January 1, 1937. The issues were the same in both cases. By stipulation the appeals were consolidated for hearing in this Court.

I.

PLEADINGS, PROCEEDINGS AND JURISDICTION.

The jurisdiction of the Circuit Court of Appeals and of the District Court.

The actions were in assumpsit between citizens of different states. Each involved an amount in excess of $3,000.00. In one of these actions (No. 11,539) the Supreme Court of the United States held that the District Court had jurisdiction of the subject matter and the parties. The pleadings were the same in the second action.

The Circuit Court of Appeals for the Ninth Circuit has jurisdiction of these appeals under the Act of April 26, 1928, C. 440, 45 Stat. at L. 466; Judicial Code, Sec. 128, subdv. (a) First; 28 U.S.C. Sec. 861 (a), 861 (b), Id. Sec. 225, subdv. (a) First; Secs. 73, 74 and 75 of the Rules of Civil Procedure for the District Courts of the United States.

The jurisdiction of this Court was also affirmed by the order of June 5, 1947, denying motions to dismiss the appeals.

II.

STATEMENT OF THE CASE AND THE QUESTIONS INVOLVED.

Abstract of statement of the cases:

On September 28, 1933, the El Dorado Oil Works, a California corporation, engaged in the manufacture of cocoanut oil in the San Francisco Bay area, entered into a written contract with the General American Tank Car Corporation, a West Virginia corporation owning and leasing tank cars, but not engaged in transportation, under which the Oil Works leased for a period of two years commencing January 1, 1934, at an agreed monthly rental, fifty (50) tank cars of specified type and size and such additional cars as the Oil Works business required. The cars were to be used by the Oil Works in the transportation of its oil within the United States. The Oil Works also agreed to report to the Tank Car Corporation the movements of each car and pay as additional rental the amount chargeable by the carriers where the empty haul exceeded the loaded haul movement. The Tank Car Corporation agreed to collect from the several railroad carriers over whose lines the cars moved the mileage allowance of 1½¢ per mile loaded and empty provided to be paid in the published tariffs and to credit and pay the mileage so collected to the Oil Works. The Oil Works operated the tank cars, paid the rentals and performed its obligations under the contract (R. 5). The Tank Car Corporation paid to the Oil Works the mileage so collected and performed its obligations under the contract for the first six months, ending June 30, 1934, of the contract

period. It thereafter refused to pay any portion of the mileage so collected in excess of the monthly car rentals paid or payable by the Oil Works. It nevertheless continued to collect the full mileage allowance fixed by the tariffs and retained the excess over the car rentals paid.

After refusal by appellee to make payment according to the contract of the sums so collected and retained, the Oil Works assigned its right under the contract and its causes of action to appellant, a wholly owned subsidiary. Appellant thereupon filed suit against the appellee to recover the sums so accrued between July 1, 1934, and May 31, 1945. Appellee in answering the complaint admitted the making of the contract, without question as to its validity, likewise, admitted that it had collected the mileage allowance for the period named in the complaint and retained the excess to the amount of $18,532.78. In explanation of its refusal to pay to the Oil Works the sums accrued under the terms of the contract, appellee pleaded as a special defense that the payment of the amount so received and retained by it in excess of the car rentals paid by the Oil Works would constitute a rebate, concession or discrimination prohibited by the provisions of the Elkins Act (R. 18). The District Court rendered judgment for defendant without opinion. Upon appeal said judgment was reversed by this Court (104 F., (2d) 903). Upon application by appellee, joined by the Interstate Commerce Commission, the Supreme Court granted certiorari and thereafter reversed and remanded the cause to the District Court for further proceedings (R. 34). In conso-

nance with the opinion of the Supreme Court, appellant made application to the Interstate Commerce Commission for an investigation under the provisions of Section 15 (13) of the Interstate Commerce Act. A limited investigation was made and on April 10, 1944, the Commission released a decision and order (Allowance for Privately Owned Tank Cars, No. 28,515 in the files of the Commission). Appellant thereupon instituted an action in the District Court of the United States for the Northern District of California before a Three Judge Court under the provisions of the Urgent Deficiencies Act to set aside and annul the order of the Commission. After a hearing the Three Judge District Court held that it had no jurisdiction, refused to hear the case upon the merits and ordered a dismissal. Upon direct appeal to the Supreme Court of the United States that Court held that the Three Judge District Court had jurisdiction, but proceeded to determine the case upon the merits and held (*El Dorado Terminal Co. v. U. S.,* 328 U.S. 12), that the Interstate Commerce Commission had determined the questions submitted to it by the previous decision of the Court and affirmed the decision of the Three Judge District Court dismissing the action. The proceedings above mentioned were all taken in or pertained to the first cause instituted by the appellant (No. 11,539 in this Court). In the meantime the second action (No. 11,538) was begun by appellant to recover $38,149.19 collected by appellee for appellant's account between the 31st day of May, 1935, and the 31st day of January, 1937, and retained in breach of the agreement of September 28, 1933.

In its answer to the complaint in this action appellee admitted the collection and retention of the amount sued for and pleaded the same special defense as in the former action. None of the proceedings above mentioned following the judgment in the first case pertained to the second action (No. 11,538), and no proceedings were had in respect of that action after the filing of appellee's answer. On July 20, 1946 (R. 37) both cases were called for pretrial hearing in the District Court. On September 16, 1946, the Court made a pretrial order (R. 37-39) and on October 4, 1946, made an amended pretrial order directing summary judgment for appellee. On October 4, 1946, judgments were entered dismissing both actions without trial (R. 46-47). Within the time allowed by law appellant served and filed its notice of appeal with its statement of points on appeal; and within the time provided by the Rules of Civil Procedure a transcript of record was duly prepared by the clerk of the District Court, certified by him and docketed in this Court (R. 48).

At the pretrial conference it was stipulated by counsel, and said stipulation was accepted by the Court, that the only issue in the two cases then before the Court was that raised by the special defense of the appellee that payment by the appellee of the sums sued for was expressly prohibited by the provisions of the Elkins Act and that the payment of such sums by appellee as provided in the agreement of September 28, 1933 would constitute a violation of the provisions of the Elkins Act (R. 38). Plaintiff (appellant here) insisted upon its right to a trial of that issue

and requested that the Court set the cases for trial. Without a trial or further hearing, the District Court made its order for summary judgment in both cases and entered the judgments from which the present appeals were taken (R. 37-39 inclusive and 44-47 inclusive).

The primary question involved on these appeals is as to the regularity (and legality) of the said orders of summary dismissal and the judgments entered thereon.

III.

SPECIFICATIONS OF ERROR.

Assignments of error to be argued and relied upon in both appeals are:

1. The judgment of the District Court of October 4, 1946, dismissing appellant's complaint was error.

2. The District Court erred in refusing to permit the action to be tried.

3. The judgment of the District Court of October 4, 1946, is error in that it is wholly unsupported by any findings of fact or conclusions of law.

Assignments 1 and 2 will be argued together and 3 will be argued separately.

IV.

ARGUMENT.

A. THE DISTRICT COURT ERRED IN ENTERING A SUMMARY JUDGMENT FOR THE DEFENDANT WITHOUT A TRIAL.

In its decision in the first of the companion cases (308 U. S. 422) the Supreme Court of the United States expressly held that the District Court had jurisdiction of the parties and of the subject matter of the action and remanded the case to the District Court for further proceedings. At that time the issue tendered by appellee's special defense was the single issue to be determined. It was an issue of fact dependent upon whether in the final result a payment by the defendant (Appellee here) of the sums collected and withheld by it in breach of the agreement of September 28, 1933, would enable El Dorado Oil Works (appellant's assignor) to have oil shipped by it between July 1, 1934 and May 31, 1935, at less than the published tariff rates, or to enjoy a rebate or other concession prohibited by the provisions of the Elkins Act. No trial or other proceeding whatever had been had since the case was remanded to the District Court. In the second case nothing whatever had been done since appellee's answer tendering the special defense was filed. The issue arising from the special defense was therefore an existing and untried issue of fact at the time of the pretrial conference. This was admitted by counsel and clearly appears from paragraph III of the pretrial order of the District Court (R. 38) which reads as follows:

> "It was further stipulated and agreed by counsel that the sole issue in this cause is that arising

from the affirmative defense pleaded by the defendant that said defendant was and is expressly prohibited and enjoined by law, and particularly by the provisions of the Elkins Act, from paying to plaintiff the moneys sought to be recovered by plaintiff in this action."

That the District Court committed error in denying a trial and entering summary judgment where there exists an undetermined issue of fact, was definitely decided in the following cases:

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 88 L. Ed. 967;

U. S. v. Hartford Empire Co., 1 Fed. Rules Dec. 424 at 427;

Avrick v. Rockmont Envelope Co., 155 F. (2d) 568 at 571;

Krug v. Santa Fe Pac. RR. Co., 158 F. (2d) 317;

Doehler Metal Furniture Co. v. U. S., 149 F. (2d) 130;

Wyant v. Crittenden, 113 F. (2d) 170.

In the last cited case decided by the Circuit Court of Appeals of the District of Columbia, it was held that where there was either a fact issue concerning the ownership of claims or an issue of law concerning the sufficiency of undisputed facts to constitute ownership, the District Court's action in granting defendant's motion for a summary judgment was error.

It may be urged that some of the cited decisions were rendered in the light of Rule 56 of the Rules of Civil Procedure which provides for a summary

judgment on motion, whereas the orders and the judgments entered thereon in the present cases were made in a pretrial conference covered by Rule 16. But this distinction is not material. Under whatever theory the Court acted, it dismissed the actions without granting a trial upon an admitted issue of fact. Tested by either rule the judgments constituted error. Rule 16 of the Rules of Civil Procedure provides for a pretrial conference to determine what are the issues in a given case and to regulate the introduction of evidence on a trial thereof. The rule does not authorize the summary disposition of a case on a pretrial conference without a trial of the admitted issues. In deciding *United States v. Hartford Empire Co.* (1 Fed. Rules Decisions, 424 at 427), the Court denied the right of the District Court to summarily dispose of an undetermined issue in the following language:

> "The court cannot prejudge. He does not know what the testimony will disclose. He cannot anticipate facts of his own will and motion."

Under Rule 56 the party moving for a summary judgment is required (paragraph (c)) to establish his right to a summary judgment by showing that the "pleadings, depositions and admissions on file, together with the affidavits, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to the judgment as a matter of law." On hearing of such a motion the defending parties are entitled to make a counter showing. No such opportunity was offered in the present cases by reason of the informal character of the motion with-

out previous notice to dismiss during the course of the pretrial conference. Moreover, it does not appear from the pleadings, depositions or admissions—no affidavits were filed—that there was no issue as to any material fact. The issue of fact based upon the special defense was disclosed by the pleadings and by the admissions upon the hearing. It was not a question of law. It was an issue of fact to be determined in the light of the effect of such payments when made and whether in that final result the shipper will have transported its oil at less than the published tariff rates.

Not only was there an issue as stipulated by counsel and recognized by the Court, but it was a triable issue of fact that could be determined only on evidence produced at a trial. Payment by carriers of the mileage allowance as compensation to a shipper for furnishing the tank cars was provided for by statute (Section 15 (13) of the Interstate Commerce Act). Such payments are recognized as lawful by the decisions of the Courts.

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 at 429, 431;

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 (56 L. Ed. 83, 87);

United States v. Baltimore & Ohio R.R. Co., 231 U. S. 274 (58 L. Ed. 218).

The decisions of the Courts have made it clear that whether an act or practice amounts to a rebate or discrimination prohibited by the Elkins Act does not turn on the intention of the parties or even upon secret

agreement designed to bypass the provisions of the statute. That question can only be determined, and must be decided, upon the proven facts and in the light of the final results to the shipper.

> *General American Tank Car Corporation v. El Dorado Terminal Co.,* supra;
> *Union Pacific Railroad v. United States,* 313 U.S. 450 (85 L. Ed. 1453).

At the time of the pretrial conference the results to follow from the payments by appellee could have been proven to show not only that appellant would enjoy no rebate, concession or discrimination prohibited by the Elkins Act, but furthermore that appellant or its assignor, the Oil Works, would not enjoy a profit on the leasing of the cars. Such a showing would completely dispose of appellee's special defense and the issue raised thereby. Notwithstanding appellant's earnest insistence upon its right to a trial of that issue, the District Court ordered summary dismissal of the actions and entered the judgments appealed from. The Court's statement (R. 44):

> "I am of the opinion that there are no facts to be determined by the court in this litigation upon which the judgment need rest,"

cannot overcome the admitted fact that there was an undetermined and triable issue. The Court's pragmatical statement only serves to indicate the obvious error of his action.

B. A JUDGMENT OF A DISTRICT COURT UNSUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REVERSAL.

The summary judgments of the District Court stand unsupported in the record by any findings of fact or conclusions of law. This Court has consistently held that such a judgment constitutes reversible error.

In *Perry v. Baumann* (C.C.A. 9th), 122 F. (2d) 409, the District Court entered a judgment of dismissal, pursuant to a motion, but made no findings of fact or conclusions of law. The judgment was reversed to the same effect in

Timetrust v. Securities and Exchange Comm. (C.C.A. 9th), 130 F. (2d) 214.

The Supreme Court has likewise held that findings and conclusions are necessary in order to support a judgment. In,

Mayo v. Lakeland Highlands, etc., 309 U. S. 310, 84 L. Ed. 774,

the District Court issued a preliminary injunction, but failed to make findings or conclusions. The Supreme Court said of this situation:

> "Moreover, if appellants conceived themselves aggrieved by the action of the Court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal."

V.

CONCLUSION.

Inasmuch as there was in each of these cases an undetermined issue at the pretrial conference, the District Court erred in ordering the summary judgment appealed from and the appellant is entitled to reversal.

Dated, San Francisco, California,
June 2, 1947.

Respectfully submitted,
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